IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1552

MARRIOTT CORPORATION,
Petitioner

v.

PAUL A. RICHARD, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PETER K. STACKHOUSE
TOLBERT, SMITH, FITZGERALD & RAMSEY
2300 South Ninth Street
Arlington, Virginia 22204
Counsel for Respondents

WILSON EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

AUTHORITIES CITED

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1552

MARRIOTT CORPORATION,
Petitioner
v.
PAUL A. RICHARD, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-15a) is reported at 549 F. 2d 303. The opinion of the district court (Pet. App. 1a-7a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1977. Petition for rehearing was denied by the court of appeals on April 4, 1977. The petition for a writ of certiorari was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer which pays no wages out of its own receipts, and whose employees receive only

their tips as compensation violates the minimum wage provisions of the Fair Labor Standards Act.

2. Whether the district court's award of full liquidated damages was proper under Section 11 of the Portal to Portal Act where petitioner knew that its tip payment plan was in conflict with an official administrative ruling of the Department of Labor.

STATUTES INVOLVED

1. The pertinent tip credit provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set out at Pet. 3-4.[1]

2. The pertinent provision of the Portal to Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251, *et seq.*, is set out at Pet. 22a.

STATEMENT

This action was brought by certain present and former employees of the Marriott Corporation under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216 (b) (hereinafter FLSA or the Act), to recover unpaid minimum wages, together with liquidated damages, court costs and attorneys' fees. The employees worked (or had worked) as waiters and waitresses at Marriott's Joshua Tree restaurant in McLean, Virginia. It was stipulated that each of the plaintiffs, during the period from July 5, 1973, to June 6, 1975, signed, as a condition of employment, the following agreement:

> In consideration of my employment at the Joshua Tree Restaurant. I hereby agree that at the end of each shift I will surrender to my employer all tips collected by me to a maximum of (the applicable federal minimum hourly wage) for each hour worked. In turn, the management agrees to pay me at least (the applicable federal minimum hourly wage) for each hour worked.

[1] The applicable minimum wage provision for the Act is 29 U.S.C. 206(b), not 29 U.S.C. 206(a) as set forth in the Petition (Pet. 2-3). The pertinent portion of Section 6(b) is set forth on page 3 of this brief.

In actual practice, the employees did not turn over any tips but, instead, retained them and endorsed back to Marriott the checks they received each week for the statutory minimum wage.[2] Since these checks did not include the amounts deducted for taxes, etc., the employees, in addition to endorsing over their checks, reimbursed Marriott for the taxes and other deductions indicated on the checks. The net result of this arrangement was that Marriott paid no compensation out of its own receipts.

Plaintiff alleged that this arrangement violated Section 6(b) of the Act, 29 U.S.C. 206(b), which requires that

> [e]very employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . wages at the following rates:
>
> (1) not less than $1.90 an hour during the period ending December 31, 1974,
>
> (2) not less than $2 an hour during the year beginning January 1, 1975,
>
> (3) not less than $2.20 an hour during the year beginning January 1, 1976, and
>
> (4) not less than $2.30 an hour after December 31, 1976.

The district court, after reviewing the 1974 amendments to the statutory definition of the term "wage" in

[2] It was stipulated that the tips received by the waiters and waitresses were always in excess of the applicable minimum wage rate.

Section 3(m), held that Marriott's pay plan violated the minimum wage provisions of Section 6(b). Specifically, the district court held that Marriott's pay plan was invalid in view of the explicit requirement in Section 3(m) that employees retain all tips and that these tips not be credited against more than 50 percent of the employer's minimum wage obligation. Accordingly, it ordered the payment of unpaid wages for the period of July 22, 1974, when Marriott first learned of the 1974 amendment to Section 3(m) and its interpretation by the Department of Labor, to June 6, 1975, when Marriott brought its compensation plan into compliance with Section 3(m) of the Act by permitting its employees to retain all tips as well as actually paying them 50 percent of the statutory minimum wage. The district court also awarded liquidated damages in an amount equal to the amount of unpaid wages.

The court of appeals unanimously affirmed the district court's basic ruling that Marriott had violated the minimum wage provisions because of its failure to meet the requirements of Section 3(m) which permit tips, up to a maximum of 50 percent of the statutory wage, to be credited towards an employer's minimum wage obligations,[3] The court of appeals also affirmed the district court's award of full liquidated damages.[4]

---

[3] Following the district court ruling, but prior to the decision by the court of appeals, another district court judge made an independent consistent ruling that the FLSA prohibits compensation plans that permit an employer to use tips to satisfy its entire minimum wage obligation, even if the plan is agreeable to the employees. See the written but unpublished opinion of Judge Albert V. Bryan, Jr. in *Usery* v. *Emersons LTD, et al*, Civil Action No. 76-11-A (E.D. Va. Nov. 23, 1976).

[4] The court of appeals vacated that part of the district court's judgment which had limited the plaintiffs' back pay award to only 50 percent of the minimum wage for all hours worked, and instead ordered an award of 100 percent of the minimum wage. Petitioner does not challenge this ruling.

ARGUMENT

The decision of the court of appeals is correct. Moreover, there is no conflict among the circuits concerning the FLSA tip credit provisions nor, contrary to petitioner's assertions, concerning the liquidated damages provision of the Portal to Portal Act. Accordingly, there is no need for review by this Court.

1. Petitioner, in essence, contends that Sections 3(m) and 6(b) are alternative wage provisions, and that an employer may either (1) under Section 6(b), pay the minimum wage and recoup it in its entirety through an arrangement with its employees whereby they agree to turn in from tips an amount equal to their cash wages, or (2) under Section 3(m), take a credit for the tips received by its employees, up to 50 percent of the statutory minimum wage, and pay the balance which in no event can be less than 50 percent of the minimum wage (see Pet. 13-14).

Section 3(m) is not, however, an alternative wage provision. It simply defines the word "wage" as that word is used in the Act, and the definition limits the extent to which an employer can use the tip receipts of its employees to satisfy its statutory wage obligation.

Petitioner's contention that Section 3(m) is only an optional wage provision, and that it can continue to use employees' tips (assuming their agreement) to satisfy its statutory wage obligation, completely ignores not only the language of Section 3(m) itself but also the legislative history of the 1974 amendments as will be shown below. Petitioner's reading of Section 3(m) would nullify Congress' intent to create a paying relationship between an employer and its tipped employees, as well as Section 3(m)'s requirement that an employer pay at least 50 percent of the minimum wage to each of its tipped employees regardless of whether they earn more

than that amount in tips. Obviously, if Congress' only intent had been to insure that tipped employees received earnings in an amount equal to the minimum wage, as Petitioner suggests (Pet. 10-11), Congress would have simply required the employers to guarantee such minimum earnings and it would have permitted the employers to make no payment where the tips were sufficient to insure at least the minimum. Indeed, as we discuss more fully below, this was just what Congressman Goddell proposed in 1966. His amendment, however, was defeated, and Congress made it clear—if not in 1966, at least in 1974—that employers must make some payment from their own pockets and that this payment must equal at least 50 percent of the minimum wage. Petitioner's pay plan did not meet this requirement and, we submit, was for that reason invalid.

In order to understand the present treatment of tips under the FLSA, it is essential to review their treatment from the original enactment of the FLSA.

The FLSA as Originally Enacted—The original Act made no reference to tips, and there was nothing in the legislative history to indicate whether Congress intended that tips could be counted as wages. Most courts followed the common law and permitted employers to credit tips against their minimum wage obligation whenever there was an agreement to this effect with the employees. The issue reached this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942), which held that the common law rules relating to tips would apply, *in the absence of legislation to the contrary*. Specifically, the Court stated:

> In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient [citations omitted]. Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, *in the absence of statutory interference*, no reason is perceived for its invalidity [315 U.S. at 397; emphasis added].

In the Court's view, the FLSA as it then read, required only that covered employees must receive a basic minimum wage. "Except for that requirement [the Court concluded] the employer [is] left free, insofar as the Act [is] concerned, to work out his compensation problem in his own way" (315 U.S. at 408).

1966 Amendments—The 1966 amendments to the FLSA revised the definition of "wages" in Section 3(m) by specifying for the first time how the wages of tipped employees were to be determined under the FLSA; these amendments also added Section 3(t), which defined the term "tipped employees" (see Pet. 3-4).

In the hearings leading up to these amendments, Congress was faced with "two diametrically opposite views" on how to treat tips under the FLSA; restaurant employees argued that tips should not be counted towards the employer's minimum wage obligation, whereas restaurant owners argued that all tips should be counted. (Statement of Congressman Dent, a sponsor of the House bill and a leading member of the subcommittee in charge of the bill, 112 Cong. Rec. 11363 [May 25, 1966]).[5] The provision finally enacted by Congress permitted an employer to credit towards a tipped employee's wage the amount of tips actually received, up to a maximum of 50 percent of the applicable minimum rate. (See Pet.

[5] For the conflicting views, see, *e.g.*, *Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 89th Cong., 1st Sess. Pt. 2 (1965), at pp. 1052, 1099-1100; *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess., Pt. 1 (1965), at pp. 133, 655. The restaurant owners made Congress aware that a majority of the waiters and waitresses collected tips which averaged more than the applicable minimum wage.

3-4). Congressman Roosevelt (who was chairman of the House Subcommittee), explained the 50 percent limit as follows:

> [W]e do not want to establish a relationship between the employee and the employer where the employer pa[ys] nothing whatsoever under the law . . . [T]he employer should be required to make some reasonable payment. We settled upon the 50 percent amount. [111 Cong. Rec. 21830 (August 25, 1965)].[6]

Prior to the final enactment of the 50 percent limit, the House considered other lower limits—ranging from 35 to 45 percent of the applicable minimum wage rate. During this debate Congressman Goodell introduced a floor amendment which would have credited toward the minimum wage payment of a tipped employee the *actual* amount of tips received, regardless of how high (or low) that amount might be. See 112 Cong. Rec. 11362 (May 25, 1966). As Goodell said, "My amendment would simply permit the employer to credit whatever tips are received, whether it is 35 cents, 10 cents, or $4.50" (112 Cong. Rec. 11363). Noting that many tipped employees were well compensated out of tips alone, Goodell said, "I do not believe we have any business going in and insisting that an employer pay an additional wage to an employee when the employee may receive in tips as much as $10,000 or $12,000 or more a year" (*ibid.*).

---

[6] Although the bill discussed by Congressman Roosevelt was not enacted, the language limiting the tip credit which that bill would have added Section 3(m) ("in no event shall the amount paid by the employer be deemed to be so increased by an amount which is greater than 50 per centum of the minimum wage rate") was virtually identical to the language of the bill enacted in the following year ("not by an amount in excess of 50 per centum of the applicable minimum wage rate"). Compare H.R. 10518, 89th Cong., 1st Sess. (re-printed at p. 45 of H. Rept. No. 871, 89 Cong., 1st Sess. [August 25, 1965]) with Section 3(m) as enacted in 1966 (Pet. 4).

The Goodell amendment was defeated and a substitute amendment, authorizing a tip credit not in excess of 45 percent of the applicable minimum wage rate, was adopted. (For the text of the amendment, see 112 Cong. Rec. 11363-11364; for the vote, see *id.* at 11365). Congressman Goodell, in opposing the substitute amendment, pointed out that under it, "if the employer received $2 or $3 or $10 an hour in tips, the gentlemen's substitute amendment would permit a credit of [only] 45 cents an hour" (112 Cong. Rec. 11364). (The minimum wage was at that time $1.00 an hour). Congressman Dent, however, supporting the substitute amendment, told the house:

> The responsibility for paying for employees always belongs to an employer. To have this Congress take the position officially that it is a requirement of a person going into a restaurant to be served not only to consider the price of the meal but also that it is his responsibility to pay the wages of the employee who serves him for food goes beyond reason. . . . I do not believe that any Member of Congress can really seriously consider this kind of amendment [112 Cong. Rec. 11363].

The bill which passed the House permitted a tip credit up to a maximum of 45 percent of the applicable minimum wage rate.

The Senate passed an identical amendment to Section 3(m) except that it allowed a slightly higher maximum tip credit of 50 percent of the applicable minimum wage. In the Senate Report on the 1966 Amendments, however, there is a broad statement which, if read literally, appears to contradict what the House intended by rejecting the Goodell amendment:

> The committee believes that the tip provisions are sufficiently flexible to permit the continuance of existing practices with respect to tips. For example, an employer and his tipped employees may

> agree that all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts. Where this occurs, the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income [S. Rept. No. 1487, 89th Cong., 2d Sess. (1966), at p. 12].

This language would seem to permit an employer to satisfy his full minimum wage obligation out of tips, rather than limiting his tip credit to 50 percent of the minimum wage. Although the Senate Report was thus in direct conflict with the House action,[7] the Wage and Hour Administrator of the Department of Labor obviously relied on the Senate language in interpreting the tip credit provision added to Section 3(m) by the 1966 Amendment.[8]

---

[7] There is no elaboration of the Senate Report language, or any explanatory discussion in the Senate debates. The conference report, which accepted the Senate bill's 50 percent maximum rather than the House bill's 45 percent maximum, does not otherwise comment on the tip credit provision. H.R. Rept. No. 2004, 89th Cong., 1st Sess. (1966), at p. 17. The Senate Report language could be read consistently with the House language if—despite its apparent breadth—it was limited to situations where the employee's tips were less than or equal to one-half the minimum wage. Thus, if an employee received 40 cents an hour in tips when the minimum wage was $1.00, it would make no difference to the employee whether his employer took the tip credit, or whether the employee turned over his tips to the employer and received back from his employer the minimum wage. In either case, the employee would receive $1.00 an hour. It is only when the employee's tips, are greater than one-half the minimum wage rate that the employee's total earnings would be less under the seemingly broad Senate Report language than under the meaning intended by the House,—and it may be (as would appear from the Senate's 1974 Report) that the Senate in 1966 did not foresee a situation where the employee would agree to turn over tip amounts in excess of one-half the minimum wage rate.

[8] Thus, 29 CFR 531.59 stated in pertinent part as follows:

> Under the employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income.

Similarly 29 CFR 531.55(b) provided:

> [I]f pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the monetary requirements of the Act. In such instances, there is no applicability of the 50-percent limitation on tip credits provided by section 3(m).

See also the Wage and Hour Administrator's Opinion Letter No. 631 of July 3, 1967 (CCH Wage-Hour Admin. Rulings ¶ 30,621) which states the same position.

1974 Amendments—The 1974 amendments to Section 3(m) require that tipped employees retain all of their tips. They also require (1) that tipped employees be informed by their employer about the provisions of Section 3(m) and (2) that the employer assume the burden of proving that the employee actually receives the amount of tips (up to a maximum of 50 percent of the minimum wage rate) which the employer credits towards his minimum wage obligation.

In explaining these changes, and, in particular, the specific requirement that all tips be retained by the tipped employee, the 1974 Senate Report states:

> This latter provision is added to make clear the original Congressional intent that an employer could not use the tips of a "tipped employee" to satisfy more than 50 percent of the Act's applicable minimum wage. H. Rept. 871, 89th Cong., 1st Sess., pp. 9-10, 17-18, 31; 111 Cong. Rec. 21829, 21830; 112 Cong. Rec. 11362-11365, 20478, 22649. See *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases 532, 67 CCH Lab. Cas. 32,630 (N.D. Ga.) ([S. Rept. 93-690, 93d Cong., 2d Sess., p. 43].

By this language, we submit, the Senate itself has completely resolved the ambiguity created by the lan-

guage of the 1966 Senate Report discussed above (and relied upon in the Wage and Hour Administrator's pre-1974 administrative rulings).[9] The citations in the quoted excerpt confirm that fact. The pages cited in House Report 871, 89th Cong., 1st Sess., state as follows:

> . . . [T]he wage paid by an employer to a tipped employee shall be deemed to be increased on account of tips by the amount of tips received by the employee . . . , but such amount shall not exceed 50 percent of the applicable minimum wage rate [H. Rept. 871, p. 9].
>
> . . . [I]n no event can the amount representing tips be deemed to be greater than 50 percent of the applicable minimum wage rate regardless of the prevailing tip practices [*id.*, p. 17].
>
> . . . [T]he wage rate that section 6 of the Act requires an employer to pay an employee shall in the case of a tipped employee be reduced by a certain amount representing such employee's tips but in no case below 50 percent of the applicable minimum hourly rate [*id.*, p. 31].

---

[9] Petitioner alleges and places great weight on the fact that portions of the Labor Department's 1967 interpretative regulations, 29 C.F.R. § 531 (which authorize a pay practice similar to the one used by Marriott) were not formally revised following the 1974 amendment to Section 3(m). (Pet. 12, 13 and 23). In fact, however, several published opinion letters of the Wage and Hour Administrator expressly invalidate those portions of the regulations relied upon by Petitioner. Opinion Letter No. 1362 February 18, 1975, BNA Wage-Hour Manual, 95:51, CCH Wage-Hour Admin. Rulings ¶ 30,975 and Opinion Letter No. 1374, April 30, 1975, BNA Wage-Hour Manual 95:52, CCH Wage-Hour Admin. Rulings ¶ 30,985, each state that the regulations cited by Marriott have been superseded by Section 3(m) as modified in 1974, and that the Labor Department is in the process of revising its interpretative regulations. Petitioner was aware of those opinion letters by the Wage and Hour Administrator, and any reliance on the superseded interpretative regulations was improper.

The next reference in the 1974 Senate Report, 111 Cong. Rec. 21829, 21830, is Congressman Roosevelt's explanation of the purpose for placing a maximum on the benefit that an employer can receive when crediting tips against its statutory minimum wage obligation (see p. 8, *supra*). The Reference to 112 Cong. Rec. 11362-11365 is the House rejection of the Goodell amendment discussed at pp. 9-10, *supra*. The references to 112 Cong. Rec. 20478 and 22649 are statements on the floor of the Senate in 1966 by Senator Yarborough, explaining the tip credit in a way which is consistent with the 1966 House approach and contrary to the 1966 Senate Report:

> There is a limitation that tips cannot exceed 50 percent of the applicable minimum wage. *In other words, an employer cannot rely on tips alone* [112 Cong. Rec. 20478 (August 24, 1966; emphasis added)].
>
> There is a limitation that tips cannot exceed 50 percent of the applicable minimum wage [112 Cong. Rec. 22649 (September 14, 1966)].

The final reference in the 1974 Senate Report is the case of *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases 532, 67 CCH Lab. Cas. ¶ 32, 630 (N.D. Ga. 1971), in which a district court ruled that tipped employees should retain all of their tips and that, in addition, the employer should pay 50 percent of the minimum wage out of his own pocket. Specifically, the court disallowed the employer's practice of satisfying its entire minimum wage obligation from the tips of its employees.

Petitioner seeks, as it must, to nullify the importance of these references in the 1974 Senate Report by claiming that they deal with a version of the tip-credit bill that did not pass or that they are merely the statements of individual legislators.

In fact, however, these references constitute the most important and revealing piece of legislative history with

respect to the 1974 amendment to Section 3(m). The significance of these references is the fact that the 1974 Senate Committee *chose* to cite them as an indication of its intention *rather* than citing contrary references that were also generated by the confusion of the 1966 legislative history.

For example, the 1974 Senate Committee chose to cite portions of the 1966 House Report which provides that in no event can tips constitute greater than 50 percent of the employer's minimum wage obligation, rather than citing the 1966 Senate Report which seemed to permit the use of all tips by an employer to satisfy that obligation.

Similarly, the decision to cite the case of *Melton* v. *Round Table Restaurants, Inc.*, 20 WH Cases, 532 (N.D. Ga. 1971), rather than the case of *Hodgson* v. *Bern's Steak House, Inc.*, 20 WH Cases, 261 (M.D. Fla. 1971), shows a conscious and meaningful effort by the 1974 Senate Committee to resolve the confusion and ambiguity caused by the 1966 Senate Committee Report. This choice of *Melton* v. *Round Table Restaurants, Inc., supra*, rather than *Hodgson* v. *Bern's Steak House, Inc., supra*, represents the 1974 Senate Committee's support for a judicial decision which *invalidated* a pay practice under which the employer was using tips as a credit against more than fifty percent (50%) of its minimum wage obligation. The 1974 Senate Committee could have cited the *Bern's Steak House* case, which approved a pay practice just like the Marriott's, and its failure to do so is an effective statement that the 1974 amendment to Section 3(m) was designed to eliminate "Marriott type" pay practices.

Likewise, the statements of Congressman Roosevelt and Senator Yarborough show that Section 3(m), as amended in 1974 was intended to insure that tips must be retained by the employees, and that an employer cannot, under any circumstances, credit or use tips to satisfy more than 50 percent of its minimum wage obligation.

Finally, the reference in the 1974 Senate Report to the defeat of the Goodell Amendment is particularly important to an analysis of the Marriott compensation plan because that plan is virtually identical to the concept proposed by Congressman Goodell. In effect, therefore, the 1974 Senate Committee has analyzed the Marriott compensation plan, and expressly stated that the plan is prohibited by Section 3(m), as amended in 1974.

Shortly after the 1974 Amendments, the Wage and Hour Administrator issued new opinion letters repudiating, based on the amendments, his earlier opinions and stating conclusively that tips must be retained by the employees, that agreements remitting tips to the employer are invalid, and that the employer must pay—in addition to the tips retained by the employees—at least one-half the minimum wage. The first of these opinion letters was issued on June 21, 1974, and others were issued on February 26, 1975, April 30, 1975 and August 12, 1975.[10]

Despite the clear wording of the 1974 Amendments to Section 3(m), the legislative history and the post amendment opinion letters of the Wage and Hour Adminis-

---

[10] Of the four opinion letters, all but the first one were published by the BNA or CCH loose-leaf services. See footnote 9, *supra*, for citations of the February 18, 1975 and April 30, 1975 opinion letters. The August 12, 1975 opinion letter appears at Wage-Hour Manual 95:53, CCH Wage-Hour Admin. Rulings ¶30,990. Even though the June 21, 1974, letter was not published, it was widely circulated throughout the industry, as evidenced by references to it in the published opinion letters and by its publication in the July 22, 1974 issue of the National Restaurant Association's "Washington Report". Moreover, despite Petitioner's allegations (Pet. 7), the June 21, 1974 opinion letter was a "public domain" letter available for public inspection, and no effort was made to keep it from publication.

trator, Petitioner nonetheless contends that its employees can, by agreement, waive the provisions of Section 3(m). Nothing is more firmly established, however, than the principle that rights under the Fair Labor Standards Act cannot be waived or diminished by private agreements between employers and employees. See, *e.g.*, *Brooklyn Savings Bank* v. *O'Neil, supra,* 324 U.S. 697; *D. A. Schulte, Inc.* v. *Gangi,* 328 U.S 108 (1945); *Mitchell* v. *Turner,* 286 F.2d 104, 106 (C.A. 5, 1960); *Handler* v. *Thrasher,* 191 F.2d 120, 123 (C.A. 10, 1951); *Caserta* v. *Home Lines Agency, Inc.,* 273 F.2d 943, 946 (C.A. 2, 1959); *Fleming* v. *Warshawsky,* 123 F.2d 622 (C.A. 7, 1941). As this Court stated in *Brooklyn Savings Bank* v. *O'Neil, supra*:

> [A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. [Citations omitted.] Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights . . . created by a federal statute, . . . the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute [324 U.S. at 704-705].

Under these decisions, petitioner's employees cannot waive their right to wages, in addition to tips, paid for out of Petitioner's own receipts; nor can they, by surrendering their tips, reimburse petitioner for all wages paid.

The illegality of the petitioner's compensation plan under the FLSA, as amended in 1974, has been recognized by the 1974 Senate Committee, by the Wage and Hour

Administrator, and by every court that has considered the matter. It is respectfully submitted that these rulings are correct, and that there is no need for this Court to further review the issue.

2. Petitioner's challenge to the award of full liquidated damages ignores the language of Section 11 of the Portal to Portal Act setting forth the conditions under which a district court is granted the discretion to reduce the full liquidated damages otherwise required under Section 16(b) of the FLSA. Those conditions were not met here, and, therefore, full liquidated damages were properly awarded.

Section 16(b) of the Fair Labor Standards Act, under which this suit was brought, provides that "[a]ny employer who violates the provisions of Section . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . . *and* in an additional equal amount as liquidated damages" (29 U.S.C. 216(b); emphasis added). These damages are not punitive, but are compensatory in nature (to compensate employees for the injuries they may have suffered by reason of not having the money at the time it was due), and, until the enactment of the Portal to Portal Act, were mandatory. *Overnight Motor Co.* v. *Missell,* 316 U.S. 572, 583-584 (1942). Section 11 of the Portal Act added an exception to the mandatory language in Section 16(b), permitting a court, "in its sound discretion," to award a lesser amount of liquidated damages, or none at all, "*if* the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, as amended" (Section 11, 29 U.S.C. 260; emphasis added).

The courts of appeals have uniformly held that the limited exception created by Section 11 of the Portal to

Portal Act imposes upon the "delinquent employer [who would] escape the payment of liquidated damages [a] . . . 'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that would be unfair to impose upon him more than a compensatory verdict.'" (*Wright* v. *Carrigg*, 275 F.2d 448, 449 [C.A. 4, 1960], citing *Rothman* v. *Publicker Industries*, 201 F.2d 618, 620 [C.A. 3, 1953]). *Accord: Newspaper Guild* v. *Republican Pub. Co.*, 8 WH Cases 140, 150-151, 156 (D. Mass. 1948), affirmed 172 F.2d 943 (C.A. 1, 1949); *Caserta* v. *Home Lines Agency, Inc.*, 273 F.2d 943, 947 (C.A. 2, 1959); *McClanahan* v. *Mathews*, 440 F.2d 320, 322-323 (C.A. 6, 1971); *King* v. *Board of Education of City of Chicago*, 435 F.2d 295, 297-298 (C.A. 7, 1970), cert. denied 402 U.S. 980 (1971); *Reid* v. *Day & Zimmerman, Inc.*, 73 F. Supp. 892, 895 (S.D. Iowa 1947), affirmed 168 F.2d 356, 360-361 (C.A. 8, 1948); *Laffey* v. *Northwest Airlines, Inc.*, 22 WH Cases 1320, 1344 (C.A. D.C. 1976, not yet officially reported).

The court of appeals, we submit, in relying specifically on *Wright* v. *Carrig*, *King* v. *Board of Education* and *Rothman* v. *Publicker Industries*, applied the proper test by requiring that Marriott establish that it was both in good faith and that it has reasonable grounds for believing that the continuation of its compensation plan following the 1974 amendment to Section 3(m) was not a violation of the FLSA, as amended, despite its actual knowledge of the contrary position being taken by the 1974 Senate Committee and the Wage and Hour Administrator (Pet. App. 15a).

Petitioner contends, however, that the court of appeals requirement that it establish "objective" good faith was in conflict with the holdings of two other circuits, in *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88 (C.A. 2, 1953), cert. denied 346 U.S. 877, and *Laffey* v. *Northwest Airlines, Inc.*, *supra*. It is clear, however, that in the instant case the court of appeals, in referring to the test of "objective" good faith under Section 11, intended to emphasize that under Section 11, "subjective" good faith is not sufficient to vest the district court with the discretion to reduce the normal award of full liquidated damages. This can be seen from the court of appeals' reliance on the additional requirement in Section 11 that an employer must show that it had "reasonable grounds for believing" that its challenged action was not a violation of the FLSA (Pet. App. 15a).

All circuits that have analyzed the issue, including the second circuit in *Addison* v. *Huron Stevedoring Corp.*, *supra*, and the District of Columbia in *Laffey* v. *Northwest Airlines*, *supra*, recognize that subjective good faith is not enough to satisfy the requirement of Section 11, and they each have held that an *objective* standard of reasonableness must be met by an employer if it is to avoid the mandatory liquidated damages provided for in Section 16(b) of the FLSA. See *Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (C.A. 4, 1969); *Rothman* v. *Publicker Industries*, *supra*; *Newspaper Guild* v. *Republican Pub. Co.*, *supra*; *McClanahan* v. *Mathews*, *supra*; *King* v. *Board of Education of City of Chicago*, *supra*; *Reid* v. *Day & Zimmerman, Inc.*, *supra*.

> Obviously in section 11 the objective standard of reasonableness is a requirement additional to that of "good faith." *Addison* v. *Huron Stevedoring Corp.*, *supra*, p. 93.
>
> The statutory call for reasonable grounds for a belief in compliance with the Act imposes a requirement additional to good faith, and one that involves an objective standard. *Laffey* v. *Northwest Airlines*, *supra*, p. 1344.

There is no question but that the Section 11 exception to mandatory liquidated damages requires an objective showing by the employer. In this case, both the district court and the court of appeals found that Marriott was unable to meet this substantial burden, and, therefore, whether or not the "good faith" requirement must itself be objective is unimportant.

Moreover, the good faith requirement standing alone has never been recognized as wholly subjective in the sense that an employer's motives or intentions can excuse any pay practice from the danger of mandatory liquidated damages, regardless of how objectively questionable it might be. Even *Laffey* v. *Northwest Airlines, Inc.*, *supra*, which relied on *Addison* v. *Huron Stevedoring Corp.*, *supra*, recognized this fact in noting that "maintenance of a practice of 'highly questionable legality' constitutes bad faith" (22 WH Cases at 1345, n. 276).

The courts below clearly recognized from the stipulated statement of facts that the petitioner's act of continuing its pay practice after the 1974 amendment to Section 3(m) was unreasonable behavior in view of the express statements by the 1974 Senate Committee and the Wage and Hour Administrator that its pay practice violated the FLSA, as amended in 1974. The Court of Appeals found that:

> [I]t [Marriott] took a chance, acted at its peril, and lost . . . as the district court stated, the administrator's opinion letter 'put the defendant on notice that it should look to its payment practices for tipped employees.' (Pet. App. 15a)

For the petitioner to suggest that its action meets the requirements of Section 11, it must argue that a "subjective belief" by the employer is all that is necessary. In fact, however, this argument has been uniformly rejected by all the circuits which have considered the meaning of Section 11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER K. STACKHOUSE
TOLBERT, SMITH, FITZGERALD
& RAMSEY
2300 South Ninth Street
Arlington, Virginia 22204

Counsel for Respondents